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In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

ALLENTOWN BROADCASTING CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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ALLENTOWN BROADCASTING CORP.

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The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on August 19, 1954.

OPINION BELOW

The opinion of the Court of Appeals (App. 1a-31a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1954 (App. 1a). The juris-

diction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. The Court of Appeals held that the Federal Communications Commission, in deciding between mutually exclusive applications for broadcast stations in different communities, pursuant to Section 307(b) of the Communications Act of 1934, as amended, can determine that one community's need for a second station outweighs the needs of the other community which already has a multiplicity of local services, only if it has first found that both applicants are approximately equal in their ability to serve their respective communities. The first question is whether such a holding imposes an undue limitation upon the exercise of the administrative licensing powers of the Commission.

2. Whether, under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, the court below improperly substituted its judgment for that of the Commission on the inferences to be drawn from undisputed facts, largely by holding that the Commission's conclusions concerning the qualifications of a proposed licensee to operate a station in the public interest, when such conclusions differ from those of its hearing examiner, must be supported by a "very substantial preponderance" in the evidence.

STATUTE INVOLVED

Section 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 49 Stat. 1475, 47 U. S. C. 307(b), provides as follows:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

This petition seeks review of a judgment reversing a decision and order of the Federal Communications Commission which granted the application of Easton Publishing Company (Easton) for a construction permit for a new standard broadcast station at Easton, Pennsylvania, and denied the mutually exclusive application of Allentown Broadcasting Corporation (Allentown) for a construction permit for a new standard broadcast station on the same frequency at Allentown, Pennsylvania.[1] The two applications are mutually exclusive because of the proximity of the two communities. Although neither proposed station would render service to the other community, the interference caused by either one to the other would have been such as to preclude the grant of both applications (R. 156, App. 2a).

The Easton and Allentown applications were the subject of a full comparative hearing before the

[1] Also before the reviewing court was a Memorandum Opinion and Order of the Commission denying Allentown's petition for rehearing of its decision to grant the Easton application (R. 257-263).

Commission.[2] Each of the parties introduced evidence respecting its service proposals and the needs for service of the respective communities which each intended to serve in the light of the broadcast service already available to those communities. The hearing examiner's Initial Decision (R. 53-147) proposed to grant the Allentown application and deny the Easton application. The examiner's choice of the Allentown applicant was based primarily upon a comparison of the relative ability of the applicants to serve their respective communities. While she found both had the minimum qualifications of broadcast licensees, the examiner considered that the Allentown applicant was better qualified to serve its community—in large part because of her belief that the Easton applicant had shown evasiveness and lack of candor in its testimony and that Easton's proposed programming

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[2] These applications were first considered in a hearing which culminated, in June 1947, in a grant to Allentown based on a determination that Allentown was in greater need of an additional broadcast facility than was Easton and that consequently a grant to Allentown was required by Section 307(b) of the Communications Act, 47 U.S.C. 307(b) (see App. 3a, 16a). This decision was reversed by the Court of Appeals for the District of Columbia Circuit on the ground that the Commission had not set forth the findings upon which this determination was based, *Easton Publishing Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 33, 175 F. 2d 344. Upon remand, the Commission ordered a further hearing on the ground that the existing record was inadequate, affirmed in *Easton Publishing Co.* v. *Federal Communications Commission*, 87 U.S. App D.C. 344, 185 F. 2d 987. The decision which is the subject of the instant case was the result of the further hearing.

could not be relied upon to meet community needs in view of the alleged uncertainty as to whether the Easton station would have a network affiliation (R. 132-145). The examiner also concluded that no determination could be made as to the relative need of the Easton and Allentown communities for additional radio stations on the basis of their population and the number of stations currently assigned to such communities (R. 145-146). She found, however, for unspecified reasons, that the overall evidence in the record showed a greater need for additional radio service in Allentown than in Easton (R. 146).

After considering exceptions to the Initial Decision and oral argument by the parties, the Commission issued its Final Decision granting the Easton application (R. 156-216). The Commission, as had the examiner (R. 132), found both applicants qualified to be broadcast licensees (R. 204-207). In doing so, the Commission considered the examiner's findings with respect to the evasiveness and lack of candor of Easton's witnesses, even though the examiner had not found this to be a disqualifying factor, but significant only in comparing the two applicants. The Commission concluded that the examiner's findings on this subject were based on her evaluation of the testimony of record.[3]

[3] In this connection the Commission stated (R. 205):

> These findings were based primarily on what was thought to be conflicts in the testimony of such witnesses, the eliciting by cross-examination of certain information which the Examiner considered should have been made

and concluded on the basis of its own evaluation of that testimony and of the record as a whole that there was no persuasive indication of reluctance, evasiveness or lack of candor on the part of Easton's witnesses (R. 204-205).

The Commission held that the principal issue in the proceeding was "which of the two communities involved has the greater need for additional standard broadcast service" within the meaning of Section 307(b) of the Communications Act, which requires the Commission to distribute licenses in such a manner as to provide a fair, efficient and equitable distribution of radio services among the various states and communities of the United States (R. 209). It pointed out that each community received radio service from stations located in other cities, and that in addition each community received local service, Allentown from the three stations located there, and Easton from the single station licensed in that city (R. 209-210). The Commission concluded that in terms of the types of programs proposed to be broadcast by each applicant, each community had a need sufficient to justify the addi-

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clear during the witness' direct testimony, and a professed lack of knowledge of a matter which the Examiner considered the witness reasonably should have known. Because of the seriousness of the matter and the fact that the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the creditability of different witnesses who make contradictory statements, we feel that we are obligated to independently evaluate the evidence in question, giving due weight to the opinion of the Examiner and the contentions of the parties.

tional service and that on this basis there was little room for choice between the two communities (R. 210-211). The decisive factor in determining which community had the greater need for a new station was held to be a lack in Easton of a choice between locally originated standard broadcast programs (R. 211-212). The Commission further found that the Easton applicant was qualified to meet this need for a choice of locally originated programs, and therefore granted its application (R. 214-215).

On appeal by respondent, the court below, with Judge Prettyman dissenting, reversed the decision of the Commission.[4] The court held that one of the "essential underlying" findings necessary for application of the choice of local service principle, upon which the Commission's decision was based, was that the respective applicants possess approximately equivalent ability to serve the needs of their respective communities (App. 6a). It concluded that the Commission had made such a finding, but had erred in doing so because the record as a whole did not provide adequate support for it. The court referred to three factors relating to Easton's proposal, all of which had been considered by the Commission, but with respect to which the majority thought that the record did not support a conclusion that Easton was as qualified as Allentown. These were the alleged indefiniteness of Easton's

[4] A companion case No. 11,897, brought while Allentown's petition for rehearing was still pending before the Commission was dismissed as premature (App. 2a). Review of that decision is not sought.

program plans, the purported evasiveness and lack of candor of its witnesses, and the fact that the Easton applicant owned and published the only newspaper published in Easton (App. 6a-14a).

Judge Prettyman, dissenting, contends that the court had exceeded its function as a reviewing court and improperly substituted its views for those of the Commission in determining whether the public interest would best be served by a grant of the Easton or Allentown application. In his view, that policy determination was one for the Commission to make, and the function of the reviewing court was merely to decide whether the policy is reasonable and supported by the findings and the evidence (App. 18a, 30a-31a). He found the findings to be "full, understandable, and abundant in references to the evidence" and more than adequate to support the Commission's conclusions (App. 17a). With respect to the alleged evasiveness of Easton's witnesses, Judge Prettyman held that the court had engaged in a "wide departure from the proper purpose and use of the demeanor test in respect to testimony" and had misapplied the decision of this Court in the *Universal Camera* case. (App. 20a-29a).

REASONS FOR GRANTING THE WRIT

We think that the decision below denies erroneously, in two major respects, the role of the Federal Communication Commission in administering the Communications Act. First, the court below has substituted its judgment for that of the Commission in an area of licensing policy which the Congress has

entrusted to the Commission. Secondly, it has misconceived the proper relationship between the Commission and its hearing examiners under the Communications Act and the Administrative Procedure Act. In both respects, the decision below, if permitted to stand, would have a serious impact not only upon the Commission but upon other Federal agencies administering important regulatory statutes.

1. Section 307(b) of the Communications Act directs the Commission to so distribute broadcasting facilities "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The Commission has determined that under this Congressional policy preference should be given to providing a listenable signal in all areas, to affording communities initial facilities for local expression and, where both of these higher priorities have been met, to affording communities a choice of local facilities. It was this latter factor which the Commission found decisive in the present case, where Allentown had three existing local facilities and Easton only one. However, the majority of the court below set aside the Commission's order granting the Easton application on the ground that there was no substantial evidence "to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal." And the court emphasized that its prior[5]

[5] In *Sky Way Broadcasting Corp. v. Federal Communications Commission*, 176 F. 2d 951, affirming *Northwestern Ohio Broadcasting Corp.*, 12 F.C.C. 727.

"approval of the 'choice of local service' principle was limited to its application in circumstances of otherwise approximately equivalent need *and applicant ability to supply such need*" (emphasis supplied). Thus, it has held, without citation of authority or analysis of the Act, that the Commission can apply the "choice of local service" factor only after the abilities of the applicants to serve the needs of their respective communities have been found to be approximately equal.

We submit that this holding is clearly erroneous, and imposes an undue limitation on the exercise of the Commission's licensing powers. In Section 307(b), Congress has directed an equitable distribution of broadcasting facilities among communities, rather than to the most deserving of competing applicants. Of course, mutually exclusive applications to serve the same community are resolved (assuming a need for service) by a comparison of the competing applicants' ability to serve the need. *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. 327. However, where mutually exclusive applications seek authority to serve different communities, the Commission determines first which community has the greater need for additional service, and then determines which applicant can best serve its need. This interpretation by the Commission of its power and duty under the Act is a reasonable one, and under familiar principles should not be set aside by the courts.

In the instant case, the Commission first found, applying the "choice of local service" principle, that Easton had a greater need for additional service than Allentown (a finding not challenged by the court below). Thereupon, finding that the only applicant to serve Easton was qualified, it granted the application of the Easton applicant. However, under the decision below, the Commission must compare the qualifications of the Easton and Allentown applicants and if, for example, the Allentown applicant is "better" qualified, its application must be granted without regard to whether or to what extent Easton's need for additional service exceeds that of Allentown. This subordination of community needs to applicants' relative abilities can only tend to create and perpetuate inequitable distribution of broadcasting facilities as between communities, in disregard of the policy declared by Congress in Section 307(b) and applied by the administrative agency established by Congress to carry it out.

It should be noted that the court below mistakenly concluded that the Commission had made a finding as to the comparative ability of the Easton and Allentown applicants to serve their respective communities. To the contrary, the Commission not only did not make such a finding but specifically refused to do so, stating that since it had found Easton to have the greater need for additional service, it was only necessary to determine whether the Easton applicant, the only one available to serve

Easton, was able to serve the needs of Easton (R. 258-259).

At the very least, the determination of the weight to be accorded to the comparative community needs for additional service as against the comparative qualifications of applicants seeking to serve different communities, is a part of the task of formulating a national broadcasting policy which Congress has vested primarily in the Commission, under broad statutory standards, rather than in the courts. *National Broadcasting Co.* v. *United States*, 319 U. S. 190. And even if the question is viewed narrowly as one of interpreting the direction of Congress for an equitable distribution of broadcasting services, the Commission's construction of the Act is entitled to great weight. *National Labor Relations Board* v. *Hearst*, 322 U. S. 111, 130-131. In any event, its judgment should not be set aside, as it was here, without any specification by the court below of its unreasonableness in law or in fact.

The issue has substantial importance in the future administration of the Communications Act. For in the aural broadcasting field (where there are over 2700 AM standard broadcast stations alone), and increasingly in television broadcasting as well, the problem no longer is to make usable signals available for all people or even to provide the first outlets for local expression, but rather to achieve the most equitable distribution of multiple facilities between communities. The decision of the court below, however, makes effectuation of a reasonable Commission policy, expressed by rule in the Com-

mission's Television Allocation Plan (Vol. 1, Part 3, Pike & Fischer Radio Reg. 91:620), and consistently followed in standard broadcast licensing proceedings where the need of one community for an additional station is demonstrably greater than the need of the other, dependent upon what the Commission properly regards as an extraneous and often meaningless comparison of the relative qualifications of competing applicants seeking to serve different communities.

2. The court below also rejected, as unsupported by substantial evidence, what it mistakenly thought was a finding by the Commission that the ability of the Easton and Allentown applicants to serve their respective communities was about equal. In so doing, it has seriously misapplied this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, as to the effect of an agency's rejection of its hearing examiners' findings.

The court's conclusion as to a lack of substantial evidence falls under three headings: (1) the uncertainty of the Easton applicant as to its program plans; (2) reluctance, evasiveness and lack of candor on the part of the Easton applicant's principal witnesses; and (3) monopoly and concentration of communications media in Easton.

With respect to items (1) and (3)—the likelihood that Easton would broadcast programs of local origin which would give the Easton community the choice of local programming which it lacked, and whether the Easton applicant's news-

paper and radio activities would be substantially separate—there is no question as to the basic facts as they appear in the record. There was no disputed testimony on these subjects, and the basic findings adopted by the Commission were essentially those of the examiner (compare R. 102-104 with R. 199-201 and R. 66, 133 with R. 170-172). These matters were carefully considered by the Commission and it reached conclusions contrary to those of the examiner with respect to their significance (R. 214-215, 206-207). The court below, in reversing the conclusions of the Commission and adopting those of the examiner on these matters (App. 6a-8a, 12a-14a), did not find that the significance accorded the basic findings by the Commission was unreasonable or arbitrary. Its opinion can fairly be read only as manifesting its agreement with the reasoning of the examiner rather than that of the Commission. As Judge Prettyman stated in his dissent (App. 31a):

> It seems to me that the court is merely substituting its judgment for the judgment of the Commission as to which of these two applicants should have the license.

We assume that the factors in items (1) and (3) would become largely irrelevant if this Court should hold, as we contend above, that the Commission was under no duty to make a comparative evaluation of the applicants' ability to serve their respective communities. And if the Commission is only required to determine whether the Easton applicant is qualified, it is clear that the Commis-

sion's conclusions on these matters were supported by substantial evidence and should have been sustained by the court below.

More important, because it might preclude the grant of a license to the Easton applicant under any construction of Section 307(b), is the holding of the majority of the court below that the Commission was without power to reject its hearing examiner's findings that the Easton applicant's principal witnesses "have been reluctant, evasive and evidenced a lack of candor", unless the Commission's contrary finding is supported by a "very substantial preponderance in the testimony" (App. 8a-12a).[6]

In *Universal Camera Corp.* v. *National Labor Relations Board, supra*, this Court weighed the statutory responsibility of the Board for administering the National Labor Relations Act against the status and function of hearing examiners under the Administrative Procedure Act, in determining the extent to which a finding of the Board is weakened by the fact that its hearing examiner made a contrary finding. The balance was struck in the following terms (340 U. S. at 492, 496):

> * * * The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse

[6] These findings of the hearing examiner pervade her other conclusions and those of the majority below because they were derived from the testimony of the Easton applicant's witnesses on the subjects of programming and concentration of communications media.

an examiner's findings only when they are "clearly erroneous." Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.

* * * * * * *

We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.
* * *

Thus, it clearly appears that this Court has already rejected the view of the court below that an agency may reject its hearing examiner's findings only if they are clearly erroneous, *i.e.*, only if the rejection

is supported by a "very substantial preponderance in the testimony."[7]

Moreover, this Court emphasized in *Universal Camera* (at p. 496) that "the significance of [the hearing examiner's] report, of course, depends largely on the importance of credibility in the particular case." In the instant case, the majority of the court below found that the examiner's conclusion that the Easton applicant's witnesses were reluctant, evasive and lacking in candor "was based in large part upon an evaluation of the demeanor, bearing, delivery, etc." of those witnesses during the hearing. To begin with, it should be noted that the case does not involve contradictory statements by different witnesses which often must be resolved by factors of demeanor which are lost in the printed record. More important, as Judge Prettyman pointed out in his dissenting opinion (App. 26a), the hearing examiner did not even assert that her conclusion was based upon the de-

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[7] That the quoted phrase, taken from Judge Learned Hand's opinion in *Universal Camera* upon remand from this Court (190 F. 2d 429, 430), overstated the holding of this Court is indicated not only by Judge Frank's concurring opinion on the remand of that case, but also by the later opinion of the Second Circuit in *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 490, which characterizes *Universal Camera* as holding that "the Board must give considerable weight to findings of an Examiner *based directly upon the 'hearing and delivery' of witnesses who orally testified before him*" (emphasis supplied). In that case, the hearing examiner specifically referred to his observation of the witnesses as part of the basis for his refusal to believe some of them.

meanor or attitude of Easton's witnesses; rather it is quite clear that her conclusion was based upon the substantive content of their answers to questions—matter which the Commission can evaluate as well as its hearing examiners. Moreover, as Judge Prettyman further stated, the issue was not one of veracity at all, but one of whether adverse inferences as to character should be drawn from testimonial statements, admittedly true, which at most were amplified upon further questioning.

Under these circumstances, we submit that *Universal Camera* did not limit the Commission's power to reject its examiner's finding and to make a contrary finding upon such an issue, entwined as it is with what is essentially an exercise of judgment in appraising the qualifications of a proposed licensee to carry out his promise of operating a station in the public interest. Since the issue was not one of veracity but of the inferences, if any, to be drawn from the substance of recorded testimony, and to make a judgment of policy thereon, the only question on review was whether the Commission's finding was supported by substantial evidence on the whole record, without giving conclusive or primary significance to the trial examiner's finding.

As this Court recognized in *Universal Camera*, Congress has placed in agency heads the responsibility for administering important regulatory statutes. That responsibility is impaired if the findings of hearing examiners on matters not involving veracity, or which are not in fact based largely

and specifically upon demeanor evidence, are made unreviewable by the agency. Cf. *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786 (C.A. 7), certiorari dismissed, 344 U.S. 206. Indeed, the decision below has the effect of reposing authority as to policy matters in hearing examiners who are responsible to no one, rather than in the agency heads who are responsible to Congress and the President. Thus, it has serious implications bearing on the relationship between all Federal regulatory agencies and their hearing examiners. Both this case and *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, *supra*, reveal a misunderstanding as to the scope of this Court's decision in *Universal Camera* which can be resolved only by this Court.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BAKER,
General Counsel,
Federal Communications Commission.

NOVEMBER 1954.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11897

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

EASTON PUBLISHING COMPANY, INTERVENOR

WKAP, INC., INTERVENOR

No. 11957

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WKAP, INC., INTERVENOR

Appeals from an Order of the Federal Communications Commission

Decided August 19, 1954

Mr. Donald C. Beelar, with whom Messrs. Charles R. Cutler and Herbert J. Miller, Jr., were on the brief, for appellant. Mr. Reed T. Rollo entered an appearance for appellant.

Mr. Richard A. Solomon, Assistant General

Counsel, Federal Communications Commission, with whom Miss Mary Jane Morris, Counsel, Federal Communications Commission, was on the brief, for appellee. Mr. J. Roger Wollenberg, Assistant General Counsel, Federal Communications Commission, at time brief was filed, was also on the brief for appellee.

Mr. Eliot C. Lovett for intervenor Easton Publishing Company.

Mr. Stephen Tuhy, Jr., for intervenor WKAP, Inc.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges

BAZELON, *Circuit Judge:*

This is an appeal from an order of the Federal Communications Commission granting the license application of the Easton Publishing Company for the assignment of a standard radio station at Easton, Pennsylvania, and denying that of Allentown Broadcasting Corporation for the same assignment at Allentown, Pennsylvania, 11 miles away.[1] It marks the third appearance of these parties before this court since their mutually exclusive applications were filed in 1945.[2]

[1] The Allentown Corporation filed the appeal in case No. 11897 before the Commission acted upon its petition for rehearing; the appeal in case No. 11957 was filed after the Commission denied the petition for rehearing. Case No. 11897 is therefore dismissed as premature and we consider only the appeal in case No. 11957.

[2] By reason of the proximity of the two cities, simultaneous operation of the proposed stations would cause mutually destructive interference. Two other applicants for these facilities are no longer in the case.

When the Easton Company first appealed to this court from a June 1947 order of the Commission awarding the license to the Allentown applicant, we remanded the case "for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need."[3] In February 1950, the Commission, rejecting a joint request for a final decision without further hearings, set aside the prior grant to Allentown, and reopened the record.[4] In March 1950, both applicants petitioned this court for writs of mandamus and prohibition directing the Commission to make a finding on the existing record. These petitions were denied on October 23, 1950,[5] and in March 1951, hearings in the reopened proceedings were commenced by the Commission.

Pursuant to our mandate, the Hearing Examiner made findings as to the comparative needs of the two communities, and the relative abilities of the applicants to serve the greater need. On the question of community need, the Hearing Examiner noted, *inter alia*, that Easton had only one standard broadcast station, whereas Allentown had three in addition to the one being operated by appellant

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[3] Easton Publishing Company v. Federal Communications Comm'n, 85 U.S. App. D.C. 33, 40, 175 F. 2d 344, 351 (1949).

[4] Allentown was, however, permitted to continue the operation of its station WHOL, a license for which was granted on February 2, 1949, and which had been built in accordance with a construction permit dated June 8, 1948.

[5] Easton Publishing Company v. Federal Communications Comm'n, 87 U.S. App. D.C. 344, 185 F. 2d 987 (1950).

under temporary authority of the Commission.[6] But in applying § 307(b) of the Communications Act of 1934,[7] which requires the Commission to provide a "fair, efficient and equitable distribution of radio service * * *," the Examiner also noted that Allentown had a population about three times that of Easton, and was growing at about four times the rate of Easton.[8] She concluded that the "over-all evidence" showed a greater need for additional service in Allentown. For this reason, and because she viewed the record as casting grave doubt upon the reliability of the Easton applicant,[9] her Initial Decision recommended a grant to the Allentown company.

The Commission in the order now challenged reversed the finding of a greater need in Allentown, and set aside various findings reflecting adversely on the ability shown by the Easton applicant to serve its community's need. It found that both applicants proposed well-balanced program service, that slight differences between the two with respect to equipment, management and the like, fairly well canceled out,[10] and that "considered separately" in terms of need for additional service of the type pro-

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[6] See note 4, *supra*.

[7] 48 Stat. 1084 (1934), as amended, 47 U.S.C. § 307(b) (1952).

[8] Easton had a population of 33,589 in 1940 and 34,410 in 1950, an increase of 2.4%; Allentown's population in 1940 was 96,904 and in 1950 was 106,233, an increase of 9.6%. No significant change is introduced by making a comparison in terms of the built-up communities contiguous to the two cities.

[9] Initial Decision, Conclusion No. 37.

[10] Commission's Decision, Conclusion No. 12.

posed by the applicants, "there is little room for choice between the two communities."[11]

In those circumstances of what it regarded as closely balanced community needs and applicant abilities, the Commission found the following to be the "decisive factor" in compelling a grant of the additional facility to Easton:

> "* * * Allentown is presently served by three standard broadcast stations located in and broadcasting local programs for that city, as well as receiving daytime service from the station located in adjoining Bethlehem, while only one standard broadcast station is located in and broadcast [sic] local programs for the Easton community. Thus, the residents of the Allentown community presently are afforded a choice between local standard broadcast programs and stations, a choice which can only be made available to the residents of the Easton community by means of an additional standard broadcast service."

This "choice of local service" principle is a gloss on § 307(b) of the Communications Act of 1934, *supra*. It was first applied by the Commission in *Northwestern Ohio Broadcasting Corp.*,[12] upon the crucial findings that the choice between the two communities was "indeed a difficult one,"[13] and that both applicants "propose[d] to render meri-

[11] *Id.*, Conclusion No. 13.
[12] 3 Pike & Fischer Radio Reg. 1945 (1948).
[13] *Id.* at 1953, Conclusion No. 4.

torious program services designed to meet the needs of the respective communities * * *."[14] Since we affirmed on appeal because there was "no error in the record,"[15] our approval of the "choice of local service" principle was limited to its application in circumstances of otherwise approximately equivalent community need and applicant ability to serve such need. Although in the present case the Commission purported to find such equivalence, we think there is no substantial evidence in the record as a whole—including the Hearing Examiner's Initial Decision—to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal.[16-17] Hence, we hold the Commission's error is fatal to the order under review and requires that the case be remanded for reconsideration by the Commission.

We discuss three phases of the record which compel us to this view. They are: (1) Uncertainty as to programming plans; (2) Reluctance, evasiveness and lack of candor; and (3) Monopoly and concentration of communications media.

(1) Uncertainty as to programming plans. At the 1946 hearing, the Easton applicant indicated that it would acquire a network affiliation if at all possible, and its proposed program schedule at that

[14] *Id.* at 1954, Conclusion No. 6.

[15] Sky Way Broadcasting Corp. v. Federal Communications Comm'n, 85 U.S. App. D.C. 425, 176 F. 2d 951 (1949).

[16-17] Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951).

time included a number of network programs. But at the 1951 hearing, its proposed program schedule contained no network programs, and no mention was made of possible network affiliation on direct examination. On cross-examination, however, the general manager of Easton, first flatly denied any present intention to affiliate,[18] then spoke of a "remote possibility that sometime in the indefinite future we might affiliate,"[19] and, finally, admitted that if licensed, "we would probably explore the possibility" and if a desirable network affiliation were available would take affirmative steps to secure it.[20]

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[18] "By Mr. Rollo:

"Q. I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network programs on your proposed AM schedule. A. That is correct.

"Q. That is your present plan, is it? A. That is the present plan.

"Q. You no longer desire to affiliate with Mutual? A. There has been no conversation with Mutual in the past five years.

"Q. You recall you originally testified you planned to affiliate with Mutual, do you not? A. I said we expected to discuss it with Mutual, but no arrangements have been made.

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"By Mr. Schildhause:

"Q. Mr. Rounsley, you stated, did you not, that you had no current plans to affiliate your proposed AM station with the network? A. That is correct."

[19] "Mr. Rollo: Did not you answer a question of mine to the effect that you did not intend to affiliate with the network?

"The Witness: I did not say we did not intend . . . I said we made no overtures at all. That is in *the remote possibility that some time in the indefinite future we might affiliate.*" [Emphasis supplied.]

[20] "The Presiding Officer: Mr. Rounsley, I am a little confused about this network proposition. I wish you would tell

Although it is plain from this testimony that a network affiliation was contemplated, the Eastern applicant, as the Hearing Examiner pointed out, offered no testimony as to "what programs now proposed would be scrapped to make way for network programs." Without such information, the Commission could not reasonably reach a conclusion in favor of the Easton Company on one of the crucial issues before it, namely, the Easton Company's ability to provide a choice of "locally originating programs."

(2) Reluctance, evasiveness, and lack of candor. The Hearing Examiner concluded that Easton's principal witnesses were reluctant, evasive, and had "not made * * * frank, candid and honest disclosures * * *." Although this conclusion was based in large part upon an evaluation of the de-

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me what your plans are with respect to network. Now let us not talk about the dim distant future, let us talk about something not quite so far away.

"The Witness: "If we have an AM facility we would probably explore the possibility of a network affiliation. We would naturally have to see what was available, what the terms are, something we do not know now, but we would explore that possibility.

"The Presiding Officer: *Am I to understand you would not wait for somebody to come to you?*

"The Witness: *That is correct.* In other words, we would have to have something to affiliate before we talk business.

"The Presiding Officer: It is still not clear in my mind. Do you plan to sit by and wait for anybody to approach you, or what would be your procedure?

"The Witness: *I think we would probably see what was available, and after we saw what was available, if there was a network that we thought was desirable and available, we would probably call them.*" [Emphasis supplied.]

meanor, bearing, delivery, etc., of the Easton witnesses who appeared before the Examiner,[21] the Commission felt obligated to make an independent evaluation of the evidence because "the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the credibility of different witnesses who make contradictory statements * * *." We cannot agree that the Examiner's findings are entitled to any less weight than findings which resolve a conflict between witnesses. Both involve a determination based upon an evaluation of the witnesses' demeanor, bearing and delivery; and it has been specifically held that the uncontradicted testimony of a single witness may be rejected on the basis of such factors, and that this is a judgment best made

[21] An examiner's findings "based on that part of the evidence which the printed words do not preserve" are not ordinarily reviewable by the agency. Judge Learned Hand in National Labor Relations Board v. Universal Camera Corp., 190 F. 2d 429, 430 (2d Cir. 1951). That the instant finding is not derived solely from evidence preserved in the printed record is illustrated by at least two findings of the Examiner. One Easton witness, she found, "when * * * questioned * * * *displayed an attitude* of evasiveness and lack of candor on the subject [of Easton's plans for a network affiliation]." [Emphasis supplied.] And she found that another witness, in testifying as to the circulation of newspapers in the Easton area, "*created the impression* that the *Easton Express* [published by the applicant company] has substantial competition from the Allentown and Bethlehem daily newspapers." Attitudes displayed and impressions created by a witness are usually demonstrated by hesitations, intonations and inflections of voice, gestures, etc., as well as by what appears in the printed record.

by the trier of fact who "had the witnesses before it * * *."[22]

The Commission, after independently examining the cold record, reversed the Examiner's findings and concluded that the testimony in question "properly viewed, gives an overall appearance of consistency, candor and straightforwardnes.."[23] But as Judge Learned Hand recently observed, " * * * we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."[24] We briefly describe certain matters appearing in the cold record which convince us that there is no such substantial preponderance in the present testimony.

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[22] Quock Ting v. United States, 140 U.S. 417, 422 (1891); National Labor Relations Board v. Howell Chevrolet Co., 204 F. 2d 79, 86 (9th Cir. 1953), *affirmed*, 346 U.S. 482; Zimmer v. Acheson, 191 F. 2d 209, 212 (10th Cir. 1951). See National Labor Relations Board v. Dinion Coil Co., 201 F. 2d 484, 487-90 (2d Cir. 1952), for an excellent historical discussion of the limited role of reviewing courts in evaluating "demeanor evidence."

[23] Commission's Decision, Conclusion No. 4.

[24] National Labor Relations Board v. Universal Camera Corp., 190 F. 2d 429, 439 (2d Cir. 1951). See also United States Steel Co. v. National Labor Relations Board, 196 F. 2d 459, 467 (7th Cir. 1952); Ohio Associated Tel. Co. v. National Labor Relations Board, 192 F. 2d 664, 668 (6th Cir. 1951).

While the Universal Camera case involved the judicial review provision of the Labor Management Relations Act, 1947 (61 Stat. 148 (1947)), the Supreme Court held that these provisions are equivalent to the judicial review provisions of the Administrative Procedure Act (60 Stat. 243-44 (1946), 5 U.S.C. § 1009(e) (1952)), which apply to the instant proceeding. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 487 (1951).

(a) In connection with the question of a network affiliation, the Easton witness, as noted earlier, first spoke of the "remote possibility * * * in the indefinite future" of a network affiliation, but later, under prodding, conceded that Easton would act affirmatively to acquire one if licensed.

(b) On direct examination, the President of the Easton Publishing Company testified that in addition to the *Easton Express*, which his company published, dailies published in Allentown, Bethlehem, Bangor (Pennsylvania), Newark, Plainfield (New Jersey), New York City, and Philadelphia circulated in the Easton area. On cross-examination it developed that the combined Easton area circulation of the Allentown and Bethlehem dailies was around 500, compared to 44,400 for the *Express*. We think the Examiner rightly concluded that the witness sought to create the misleading impression that his newspaper had substantial competition from the Allentown and Bethlehem dailies.[25]

It cannot be said that the evasiveness and lack of candor of Easton's witnesses related to matters of little consequence, for the Easton Company's monopoly position and the provision of locally-originating rather than network programs were issues of paramount importance in the proceedings before the Commission. In any event, as the Supreme

[25] Another example, which, if less significant, is nonetheless revealing, is the professed inability of the President of the Easton applicant to state the amount of dividends paid by his company for 1950. Since he had been with the company for 33 years, had attended weekly directors' meetings, and in addition to being president, was treasurer and a stockholder of the company, his claimed ignorance does not appear credible.

Court has made clear, the importance of the matters concealed, obscured or evaded

> " * * * is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose."[26]

(3). Monopoly and concentration of communications media. The Easton applicant publishes the only newspaper in Easton. It is the licensee of one of two FM radio stations, and of the only television station in that community. Such concentration of communications media has been viewed by the Commission as contrary to the public interest,[27] and this court has upheld that view.[28] Although recognizing that diversification of news sources is a "public interest" factor, the Commission did not find it controlling here because (a) Easton's newspaper and radio operations would be "substantially separate"; and (b) there was no evidence that Easton had used its newspaper ownership "to attempt to

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[26] Federal Communications Comm'n v. WOKO, Inc., 329 U.S. 223, 227 (1946).

[27] See, *e.g.*, WSMB, Inc., 5 F.C.C. 55 (1938); R. R. Jackman (WREN), 5 F.C.C. 496 (1938); Louisville Times Co., 5 F.C.C. 554, 559 (1938).

[28] Scripps-Howard Radio, Inc. v. Federal Communications Comm'n, 89 U.S. App. D.C. 13, 19, 189 F. 2d 677, 683, *cert. denied*, 342 U.S. 830 (1951); Plains Radio Broadcasting Co. v. Federal Communications Comm'n, 85 U.S. App. D.C. 48, 52, 175 F. 2d 359, 363 (1949).

obtain a monopoly over news sources * * *, or otherwise in a manner not in the public interest."

At the hearing the general manager of the proposed Easton station, an employee of the Easton Publishing Company for 16 years, testified that he was assigned to "this phase of the Easton Publishing Company activities" because for many years he had thought "that a radio station would be a very, very valuable complement to our newspaper activities * * *." He also testified that "accounting and everything like that" for the FM station currently operated by the Easton applicant are handled by the *Easton Express*. This scarcely portrays a picture of "substantially separate" operation.

There is no dispute that for twelve years, from 1936 to 1948, the *Easton Express* failed to carry the program logs for Station WEST, the city's only standard broadcast station, although during that period it regularly carried the logs of the New York City network stations. While the Commission did not approve this practice, it felt that the change of heart since 1948 was "some indication of the lack of an intention to freeze out WEST," and concluded "that the Easton Publishing Company is not disqualified to be a station licensee solely because of its newspaper ownership and activities."

Such conduct may, of course, be a highly significant factor,[29] particularly when the offending ap-

[29] Cf. Mansfield Journal Co. v. Federal Communications Comm'n, 86 U.S. App. D.C. 102, 109, 180 F. 2d 28, 33 (1950).

plicant already enjoys a formidable control over communications media in the community. Whether the Commission considered this former practice in weighing the relative abilities of the competing applicants does not clearly appear from the record. But even if it did, it apparently deemed such conduct inconclusive in light of its findings that (1) the radio and newspaper operations would be "substantially separate," (2) Easton had not equivocated regarding its network affiliation and programming plans, and (3) its witnesses had presented consistent, candid, and straightforward testimony. Since we hold these findings erroneous, the Commission must re-evaluate the effect of the Easton Company's news monopoly and its past conduct on the issue of the relative abilities of the two applicants to serve in the public interest. Upon such re-evaluation, these factors may well assume a different and perhaps decisive importance.

Contrary to appellant's contention, we think the Commission did consider existing or authorized FM and television facilities in Easton as bearing upon the relative needs of the communities for an additional AM facility.[30] Since operations under the television authorization did not commence until after the hearing, there is nothing in the record to show the extent to which actual operation has affected the need for an additional AM outlet for

[30] See Easton Publishing Co. v. Federal Communications Comm'n, 85 U.S. App. D.C. 33, 38-40, 175 F. 2d 344, 349-51 (1949).

local self-expression in Easton. We are unwilling, however, in light of the protracted history of this controversy, to order a further hearing "to bring the record up to date * * *."[31]

We have considered other contentions advanced by appellant and find them without merit.

Reversed and remanded for a redetermination in accordance with this opinion.

PRETTYMAN, *Circuit Judge*, dissenting: I disagree with my brethren in this case, and, because I fear that the opinion advances some unwise new law in the administrative field, I state the reasons for my dissent.

I think there is in this record no proper ground upon which a court can reverse the Commission.

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[31] Interstate Commerce Comm'n v. Jersey City, 322 U.S. 503, 514 (1944). The Court observed: "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." See also Communications Act Amendments, 1952, § 14 (b), 66 Stat. 720 (1952), 47 U.S.C. § 402(h) (1952), providing that "unless otherwise ordered by the court * * *," the Commission shall give effect to the judgment of the court reversing an order of the Commission "upon the basis of the proceedings already had * * *."

When this case was here the first time[1] the Commission had held a comparative hearing upon mutually exclusive applications for a radio license, made findings of facts, and awarded a license to one of the applicants. In practical effect the award was to one of two competing communities located just fourteen miles apart. In a unanimous opinion this court discussed at length the features of a choice between two well-qualified applicants. We passed upon several contentions attacking the Commission's award. In every instance, except one, we sustained the Commission. In that one instance the Commission had found that "Allentown is in greater need of another radio station than Easton" and that the Allentown applicant was better qualified to meet that need, but it made no finding which would indicate why or how it reached those conclusions. Because of that lack, when the findings were attacked we could not tell whether they were arbitrary or not. For that lone reason we remanded the case. The opinion was quite explicit that the remand was to permit the Commission to make the missing findings as to the comparative needs of the communities and the relative abilities of the applicants to meet whichever was the greater need.

Upon the remand the Commission proposed to reopen the record for further evidence. Both applicants objected. They brought the matter back

[1] Easton Pub. Co. v. Federal Communications Comm'n, 85 U.S. App. D.C. 33, 175 F. 2d 344 (D.C. Cir. 1949).

here. This court, again unanimously, held that it was the Commission's duty to award applications in satisfaction of public convenience, interest or necessity "at the time of the award". We declined to forbid the Commission's holding of further hearings. The hearings were held, and the Commission made findings. I have never seen more meticulous compliance with the requirements for findings by an administrative agency. There are sixty printed pages of them. They are full, understandable, and abundant in references to the evidence.

The reasoning upon which the Commission reached its ultimate decision is clearly stated and is fully justified by the record. After considering the applicants and the communities from every conceivable angle, it concluded that "on the basis of most of the above factors and other considerations advanced by the applicants," there was little room for choice. This was a natural and entirely proper conclusion. We had already remarked in the opinion upon the first appeal that to a disinterested eye two neighboring communities are often relatively the same in merit. The Commission continued: "There is one decisive factor, however, * * *." This was a proper and, indeed, highly commendable presentation of the view reached by the Commission. Many times two conflicting interests are well-balanced save for one decisive factor. It is the part of honesty to say so frankly, instead of weighting the factors which seem to

favor the side which must win and deflating the loser's assets. In the case at bar the decisive factor was clearly and succinctly stated. It was:

> "Allentown is presently served by three standard broadcast stations located in and broadcasting local programs for that city, as well as receiving daytime service from the station located in adjoining Bethlehem, while only one standard broadcast station is located in and broadcast local programs for the Easton community."

If we can understand that conclusion, and if it is supported by the findings, and if the findings are supported by the evidence, our function as a reviewing court is nil. We cannot determine what is the public interest, etc., or where the balance between the applicants or the communities lies. We can only make sure that the Commission acted within its constitutional and statutory authority. I think it did so in this case, and I do not even formulate, much less express, any view upon the merit of its judgment. It, not the court, as the Supreme Court has frequently said, is the judge of the public interest. And it, not the court, has been empowered by the Congress to distribute radio licenses among the several states and communities. It cannot be arbitrary; a court will prevent that. But, if its conclusions on a comparative selection of a licensee are fairly found, a court has no power in the matter.

My brethren say there is no substantial evidence on the record as a whole "to support the essential

underlying finding that the ability of the applicants to serve their respective communities was about equal." They specify the particulars in which they think the lack lies.

First. The court says that there is no substantial evidence on the record as a whole to support the Commission, in that the Easton applicant was uncertain as to its programming plans. The point centers about the testimony of a Mr. Rounsley. I do not read that testimony as my brethren do. It seems to me that the cross-examining attorney was trying to make the witness say things the cross-examiner wanted him to say but with which the witness did not agree. The witness insisted that, while Easton had no then-present plans for affiliation, it would, if it got the license, see what was available in the way of network affiliation and if a desirable one was available "we would probably call them." The cross-examiner tried to make him say that Easton did not intend to affiliate with a network, but the witness refused to say that. I see nothing indefinite about that testimony under the circumstances. Easton had not been on the air. The applications for the license had been pending six years. To hold extant a firm commitment from a network for that length of time would appear to me to be an amazing feat, and an unblushingly affirmative assertion about securing a network contract would seem to me to be pure and simple sales talk. On the other hand Allentown had been on the air since February, 1949, having been granted a license in the early

stages of this proceeding. It had a network affiliation. At the hearing in 1951 Allentown was definite as to what it would do if it kept its license; it would continue to do what it was doing. Easton might well have been thinking that if it ousted Allentown from the disputed license it might take over Allentown's network contract.

To me it seems completely unrealistic to say that there is no substantial evidence in a record to support a finding of equal ability of two applicants because the applicant which had been operating under a license for two years was definite as to its program contracts while the applicant who was merely hoping at that stage and had to rely upon future events to make firm outside commitments was uncertain about them. If that is to be a policy the initial winner in the early rounds of one of these battles has a well-nigh insurmountable advantage over its rivals. The issue is ability—not past performance but future ability. The court seems to say that, if the initial loser cannot be definite and firm as to his program contracts, there is no substantial evidence to support a finding that his ability is equal to that of his rival who has been on the air *pendente lite*. To me this part of the court's view is without substantial foundation and is erroneous in the processes of its reasoning.

Second. The court says that there was no substantial evidence on the record as a whole to support the Commission's finding, in that Easton's principal witnesses were reluctant, evasive, and lacked

candor. The hearing examiner held to that effect; the Commission overruled her on the matter; the court says that the Commission erred, because certain matters convince the court that there was no substantial preponderance in the testimony against the trial examiner's view.

The court relies upon a statement by Judge Learned Hand in the *Universal Camera* case.[2] But Judge Hand was writing after the original decision in that case, supported by an opinion by him, had been reversed by the Supreme Court.[3] The natural frame of mind consequent to such circumstance moved Judge Frank to a delightful concurrence which throws much light upon the opinion of Judge Hand. The Labor Board had in that case reversed a finding made by one of its examiners. The Second Circuit was puzzled by the situation thus created but held that while the Board could not ignore an examiner's findings a reviewing court could not consider the Board's action in reversing the finding a factor in the court's own decision. The Supreme Court discussed the matter at length.[4] It held that an examiner's findings are not as unassailable as are a special master's under the Civil Rules;[5] that "The 'substantial evidence' standard is not modified in any way when the Board and its examiner

[2] National Labor Relations Bd. v. Universal Camera Corp., 190 F. 2d 429 (2d Cir. 1951).

[3] Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951).

[4] *Id.*, 340 U.S. at 492-497.

[5] A master's findings are reversible only if clearly erroneous. Fed. R. Civ. P. 53(e) (2).

disagree"; that evidence may be less substantial when an examiner has rejected it than it is when he adopts it; that his findings "are to be considered along with the consistency and inherent probability of testimony"; and that "The significance of his report, of course, depends largely on the importance of credibility in the particular case."

With the Supreme Court opinion on the point before us, we look at the case at bar. The examiner held that "management officials" of Easton "have been reluctant, evasive and evidenced a lack of candor". She specified instances on the part of the president and general manager (one man) and said "Other examples of evasiveness and lack of candor on the part of the general manager" of the proposed Easton station were considered, but I do not find what those examples were. Exception to the findings having been filed, the Commission considered them and failed to find the evasiveness and lack of candor the examiner found. The examples she cited, and which the court now discusses, are easy to consider upon the face of the record. They are not premised upon demeanor.

The first example is the program planning which we have discussed. I not only do not see evasiveness or lack of candor in it; the testimony seems fair, honest and complete to me. The second example is that the president of the company could not testify to the amount of the dividends declared in the year 1950. Here are the pertinent questions and answers, as they appear in the joint appendix before us:

"Q. Did the corporation declare dividends last year? A. Yes.

"Q. What was the size of the dividend?

"* * *

"* * * A. I don't know that without checking the record."

To me that testimony was not evasive and did not lack candor. Corporate officials testifying to a maze of figures, as this one was, frequently insist upon reference to the records for detailed figures as a matter of caution and accuracy. Indeed wise counsel forewarn witnesses against testifying by unrefreshed recollection on corporate statistics. If the object of the examination is the truth, the records are the best evidence. If the object is to test credibility, corporate statistics are not the field in which to do it. In the present case the records were available; indications are they were in the hearing room. I think the witness demonstrated commendable care.

The third example is that the president of the company testified to the published circulation figures of several newspapers which were circulated in the Easton area but upon cross examination it developed that the actual circulation of those papers in Easton itself was very small. The examiner said that by the direct testimony "he created the impression that the Easton Express has substantial competition from the Allentown and Bethlehem daily newspapers", whereas, in fact, as he showed on cross examination, this competition did not exist. The question asked this witness on

direct examination was prefaced by a remark by his counsel that in some prior hearing a question had been asked about the circulation of a Bethlehem, Pennsylvania, paper; the witness was asked if he had that figure. He replied that an association of newspapers published those figures, and he read the published figures for a number of newspapers into the record. His counsel then passed on to other matters. Opposing counsel picked up the subject and asked about the circulation figures in the Easton city zone. The witness read the figures from the same publication.

I note a few features of this episode. (1) No false statement is alleged to have been made. One counsel asked for some figures, and his opponent asked for more. All were truly given. (2) The nub of the present point is an impression on the part of the examiner that the witness attempted to create an impression. If it was an attempt by the witness it was not too smart an attempt. All the figures were apparently in the same publication, readily available to anybody. (3) The point was trivial. The Easton Press is the only paper published in Easton. How many out-of-town papers were sold there was of minimal importance. (4) Trial counsel generally will be startled to learn that, if they inquire about a subject and an opponent develops further facts about it, this court is of opinion that the failure of initial full development upon direct examination can, in the absence of any false statement, be used as a basis for reduc-

ing all the testimony on that side of the case to less than substantiality. I think so mighty a conclusion cannot properly be drawn from so tiny a premise.

So, when I examine the three examples given in support of the position that Easton's principal witnesses were reluctant, evasive, and lacked candor, which are instances easily checked on the written record, I find no substance whatever. As to other instances of evasion, etc., not identified by the examiner, I cannot consider them, because I do not know what they are. Neither does the court know.

My brethren say that the examiner's conclusions as to reluctance and evasion were based upon demeanor, bearing, delivery, etc., and in a footnote refer to the examiner's findings as to attitudes and impressions. This is a wide departure from the proper purpose and use of the demeanor test in respect to testimony as I understand it. The demeanor of a witness may be an indication whether he is or is not telling the truth. It is a reactor of credibility. But if a witness is telling the truth, his demeanor in telling it is no factor in its acceptability. The parade of witnesses is not a popularity contest. The truth need not fall trippingly from the lips; it may come haltingly, timorously, cautiously. But if it is the truth, the mannerisms of its delivery are no detraction. And so if a witness tells the truth, a hearing officer cannot say, "To be sure, he told the truth but I got an impression that he would have liked to deceive me, and so

I will not accept his statements." The examiner in the case at bar did no such thing as that. She found evasion and lack of candor in what the witness did, not in how he did it. She rejected his testimony because of the substance of it, not because of the demeanor of the witness in the delivery of it. For example, in respect to the newspaper circulation incident, she found evasion in the fact that the witness on direct examination read into the record the total circulation figures but not the Easton area circulation. She did not find evasion because of his manner of reading. There is no question as to the truth of the figures he read. Whether he was myopic, unnecessarily cautious or meticulous, stuttered or spluttered was no part of her consideration, as I understand her reasoning. She found evasion because he read some figures and did not read others. The same observations apply to the other item mentioned by my brethren, the network plans. The evasion found by the examiner was in the substance of the testimony. She simply did not believe that the Company had made no plans. If the witness had said it with the charm of a television commercial, she still would not have believed it. Demeanor was not the index of the evasion; the substance of what was said was evasive in the examiner's view. I think the examples of alleged evasiveness in this case are precisely the sort which an agency can itself evaluate upon the record.

The Commission itself found no evasiveness and reversed its examiner's conclusions. The Supreme

Court held in *Universal Camera, supra*, that the findings of the hearing examiner do not have to be clearly erroneous to be reversed by the agency. "The responsibility for decision", said the Court, "thus placed on the Board" is inconsistent with the clearly-erroneous requirement.[6]

This court reverses the Commission on this point because it finds no substantial preponderance in the evidence against the examiner's views. The court gets that rule, as I have pointed out, from Judge Hand's comment upon the Supreme Court opinion in *Universal Camera*. I am not sure what Judge Hand's statement means in the abstract, when read in the light of the Supreme Court's clear statement that an examiner's findings can be reversed by the agency for less than clear error. But I am sure that his statement does not deny the power of the agency in a case like the one before us. In the first place the lack of justification for the examiner's conclusions in the three instances she specified is as clear as a record can be. In the second place even the total of the three examples is no justification whatever for the blanket conclusion that there is no substantial evidence. The cited examples, even if accurately evaluated, are only small reeds; they are not footings for a heavy superstructure. I think my brethren are in flat conflict with the Supreme Court ruling when they reverse the Commission on these differences between the Commission and its hearing examiner.

Moreover the court seems to equate an agency's

[6] *Supra* note 3, 340 U.S. at 492.

power to reverse its own examiner's finding with a reviewing court's power to reverse the agency's finding. It cites cases dealing with a court's power. This is interesting because in one cited Second Circuit case[7] Judge Frank cites and quotes from another Second Circuit opinion,[8] in which the court differentiated between "testimonial inferences", based upon estimates of credibility, and "derivative inferences," inferred from the testimony. The court may disregard the latter, said Judge Frank, and added: "And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the tesimony."[9] The conclusions in dispute in the case at bar, as made by the trial examiner, were most truly "derivative inferences", and moreover, to my way of thinking, had but flimsy foundations in the testimony. They could, and should, have been disregarded by the Commission. Furthermore I do not think the power of the court to reverse the agency is as extensive as is the power of the agency to reverse its examiner. That is the plain teaching of the *Universal Camera* case and also of the Administrative Procedure Act, as I read them. And such is the reasonable rule, because the whole rationale of administrative procedure rests upon findings by the agency, the body empowered by Congress to make the adjudication. Of course, in

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[7] National Labor Relations Board v. Dinion Coil Co., 201 F. 2d 484 (2d Cir. 1952).

[8] American Tobacco Co. v. The Katingo Hadjipatera, 194 F. 2d 499 (2d Cir. 1951).

[9] *Id.* at 451.

a disputed finding which depends upon demeanor, or upon some other feature better estimated by the person who sees the witnesses, observes their gestures, delays, etc., and hears their intonations, inflections and emphases, that person is best able to resolve the dispute. But where findings are made from factual data, or factual statements, the responsibility for the action is upon the agency itself. In such instances it cannot be bound to make a finding which it does not believe to be accurate. In the case before us the alleged "evasiveness" was not a matter of demeanor but a matter of factual substance of testimony.

Third. The court entitles this part "Monopoly and concentration of communications media." The facts are important. There is now only one standard broadcast station in Easton; it is not owned by the present applicant. Allentown has three standard stations. In respect to standard stations, therefore, the question is whether Easton should have a *second* station, bringing competition to a present monopoly, or Allentown should have four. Of course many other considerations enter, all as pointed out in our opinion in the first appeal. For example, Easton has two FM stations, one of which is owned by appellee, while Allentown has one operating and one under-consideration FM station. It is agreed that so far as receivers are concerned the FM broadcasts are a minor consideration. The point here is that the "monopoly" feature is not a simple black-and-white problem.

In the next place the permissible amount of con-

centration of mass communication, involving broadcast stations and newspapers, is peculiarly a problem for the Commission. Here, indeed, is a regulatory problem. Ownership of a station by a newspaper can hardly be denounced *per se*. In the District of Columbia two of the four radio-television stations are owned by newspapers. In the instant case the Commission weighed many factors in this connection and produced a judgment on the point. I think the court should let it alone.

On the basis of the foregoing three considerations—(1) indefiniteness of program plans, (2) evasiveness of witnesses, and (3) concentration of communication media—the court concludes that there is no substantial evidence on the record as a whole to support the Commission's conclusion that the ability of Easton to serve its community is equal to the ability of Allentown to serve its community. I think, as I have indicated, that none of the three specifications has substance. I think, further, that the conclusion of the court does not follow from its specifications. Even if Easton's program plans were indefinite as to network affiliation, and its witnesses were evasive in the manner specified (network plans, unrefreshed recollection as to dividends, and the newspaper circulation matter), and the local newspaper would own one of the two standard radio stations, it does not follow that there is no substantial evidence of Easton's equal ability. There is ample evidence in the record on the point, as the fully documented findings readily show. The

court does not merely differ with the Commission upon the relative evaluation of the applicants' abilities. It does not merely say there is less evidence in support of Easton than in support of Allentown. It strikes relative evaluation entirely from the case. It says there is no substantial evidence—none—in favor of Easton. It might be proper (although I would not agree with it) for the court to say that in view of the three specifications it is of opinion that the evidence of the ability of Easton is less than the evidence of the ability of Allentown. But it could not reverse the Commission on that basis. It can reverse only if there is no substantial evidence, on the record as a whole, to support the Commission's conclusion. The court finds no such evidence. I think its conclusion to that effect is not supported even by the three specifications it makes. It seems to me that the court is merely substituting its judgment for the judgment of the Commission as to which of these two applicants should have the license. It has no power to do that.

I would affirm.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 11,897

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE, EASTON PUBLISHING COMPANY, INTERVENOR, WKAP, INC., INTERVENOR

APRIL TERM, 1954

No. 11,957

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE, WKAP, INC., INTERVENOR

Appeals from an Order of the Federal Communications Commission

Before: Wilbur K. Miller, Prettyman, and Bazelon, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the transcript of the record from the Federal Communications Commission, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Federal Communications Commission appealed from in Case No. 11,957 be, and it is hereby, reversed, and that said case be, and it is hereby, remanded to the said Federal Communications Commission for a redetermination in accordance with the opinion of this Court.

It is further ordered by the Court that the appeal in Case No. 11,897 be, and it is hereby, dismissed as premature.

Dated: August 19, 1954.

Per Circuit Judge Bazelon.

Separate dissenting opinion by Circuit Judge Prettyman.

United States Court of Appeals for the District of Columbia Circuit. Filed August 19, 1954. Joseph W. Stewart, Clerk.

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